

Imagine this scene: your company just purchased a prime piece of property and has proceeded to establish your business on that land. Your company uses few chemicals and those you do use are carefully managed. Ten years later, chemicals commonly used to degrease parts appear in private wells in the area. Upon investigation, it is found that 30 years ago, a previous owner of the land operated a printing plant on the site. This company used hundreds of gallons of the same chemical to clean their presses and they disposed of the remaining chemical on the ground. The groundwater is now contaminated. You didn't put it there, but you own the land. And the printing company is out of business.

Who's going to restore the groundwater aquifer? According to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), or Superfund, your company, as the landowner, can be held responsible for the cleanup. The EPA will either order your company (and other potentially responsible parties on the chain of ownership) to clean the site or they will clean it themselves and sue you for reimbursement.

What defense does your company have?

Superfund only recognizes three defenses to a landowner's liability in such a case. These include: an act of God, an act of war, and an act of omission, or, the "innocent landowner" defense. An innocent landowner is one who used "due diligence" to determine if there was a potential for contamination on the site before buying it.

Because current owners can be held liable for environmental damage on their land, even when they didn't cause it, lenders and insurance providers will usually protect their assets by requiring an environmental inspection of the property prior to its purchase. Commonly called a Phase I Environmental Site Assessment (ESA), this inspection provides the "due diligence" necessary to assess the environmental conditions of the property with reasonable confidence.

For a Phase I to have any meaning in establishing an innocent landowner defense, it must be produced following guidelines established by the American Society of Testing Materials (ASTM). The guidelines are voluntary, but they are a consensus among lenders of what research is necessary to provide a satisfactory evaluation of a property's environmental condition.

Anyone can perform an initial transaction screening, which includes a questionnaire along with limited research to screen out obviously unsuitable property. However, a Phase I ESA must be performed by an environmental professional. It is very important that the professional performing the Phase I ESA uses ASTM guidelines and includes the following:

History of site usage: A title search, interviews of past owners and neighbors, map analysis, and historical document analysis should be conducted.

Review of public records: A search of federal, state and local information to identify nearby regulated facilities that could impact the property (e.g., underground storage tanks, hazardous materials generation amounts) should be evaluated.

Site reconnaissance of property and adjacent properties: A walkthrough site inspection should be completed to identify recognized environmental hazards such as disposal sites, leaks, storage tanks, water or gas wells, and sumps, or the obvious presence of asbestos, lead, or transformers that contain PCBs. In addition to the physical inspection, the topography, geology, and hydrology of the site and surrounding region should be researched and evaluated to determine the potential for a neighbor's contamination to migrate to the property.

Without a proper Phase I ESA, your company cannot prove due diligence was used to evaluate the environmental conditions of the property, and thus cannot claim to be an innocent landowner.